NO. 83-5530

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS N. SCHIRO,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I. Are the review procedures established by the Indiana death penalty statute, I.C. 35-50-2-9 and adopted by the Indiana Supreme Court adequate to insure that the death penalty will not be imposed in Indiana in an arbitrary and capricious fashion, thus violating the Eighth Amendment's prohibition against cruel and unusual punishment?

II. While petitioner's case was pending on appeal, the Indiana Supreme Court ordered that the trial court amend its written findings at the sentencing so as to include on or more of the statutory aggravating circumstances. Did such a procedure deny the petitioner the due process of law and twice place him in jeopardy in violation of the applicable Constitutional provisions?

III. Was the petitioner twice placed in jeopardy by the trial judge's decision to impose the death penalty notwithstanding the jury's prior sentencing verdict that the death penalty not be imposed?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those shown in the caption of the case.

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TABLE OF AUTHORITIES

REFERENCE TO THE OPINION BELOW

The opinion of the Indiana Supreme Court, reported at 451 N.E.2d 1047, appears as Appendix A hereto.

STATEMENT OF THE GOUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Indiana Supreme Court was entered on August 5, 1983. (In that court, no separate judgment is entered, it being contained in the opinion.)

The Supreme Court of Indiana is the highest court in that State having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11(B))

This petition for writ of certiorari will be filed within sixty (60) days of the judgment of the Indiana Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States:

5th Amendment:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * "

8th Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

14th Amendment, §1:

> "* * * nor shall any state deprive any person of life, liberty or property, without due process of law * * *"

Indiana Code, I.C. 35-50-2-9:

> (Due to its length, it is set out in Appendix B)

Rule 2, Indiana Rules for the Appellate Review of Sentences:

"(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

STATEMENT OF THE CASE

The action was instituted by the filing of a three (3) count information against the petitioner on February 10, 1981 charging him with Count I - Murder, Count II - Murder while committing and attempting to commit rape, and Count III - Murder while committing and attempting to commit criminal deviate conduct. On April 9, 1981, the respondent filed Counts IIA and IIIA, alleging that the murder as set forth in Counts II and III was intentionally committed, and requesting, in each count, that the death penalty be imposed.

On April 6, 1981, the petitioner filed a motion to dismiss the information, alleging, inter alia, that the Indiana death penalty statute, I.C. 35-50-2-9, was in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in that it fails to provide "adequate review procedures so as to insure that the death sentence is not motivated by passion or prejudice, or is arbitrarily inflicted". The petitioner's motion to dismiss was denied on May 19, 1981.

Trial to a jury commenced on September 2, 1981. On September 12, 1981, the jury found the petitioner guilty of Murder while committing and attempting to commit rape as charged in Count II of the information. The facts of the case are summarized in the decision of the Indiana Supreme Court set forth at Appendix A.

Pursuant to I.C. 35-20-2-9, Appendix B, infra, the jury reconvened on September 15, 1981 for the sentencing hearing. At the hearing, both parties moved to incorporate by reference the evidence adduced at trial. After deliberations of approximately one hour, the jury returned with its verdict that the death penalty not be imposed.

Sentencing before the trial court was held on October 2, 1981. The court, rejecting the jury's sentencing verdict, imposed the death sentence. As part of the sentencing, the court read and filed its written findings and judgment which are set forth in Appendix C.

Petitioner filed a Motion to Correct Errors (the Indiana prerequisite to an appeal) on November 30, 1981. In it, he again raised the questions presented in his Motion to Dismiss. In addition, the petitioner alleged the following errors:

> "The Court's imposition of the death penalty after a verdict by the jury recommending that no death penalty be imposed constitutes double jeopardy, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §14 of the Constitution of Indiana. Said action further violates Article 1, §19 of the Constitution of Indiana which gives to the jury, in criminal cases, the right to determine the law and the facts.
>
> The Court, in imposing the death penalty, failed to make the required factual findings as set forth in IC 35-50-2-9. In addition, the aggravating circumstances listed by the Court in imposing the death sentence are not those set forth in IC 35-50-2-9, and some of those factors listed as aggravating circumstances by the Court are in fact mitigating circumstances as defined by IC 35-50-2-9. Further, the Court considers evidence outside of the record and not presented to the jury. The imposition of the death penalty under these circumstances constitutes cruel and unusual punishment and a violation of due process of law in contravention of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, §§12 and 16 of the Constitution of

Indiana."

The petitioner's motion to correct errors was overruled on December 1, 1981. He then prosecuted his appeal to the Indiana Supreme Court, reiterating in his appellant's brief the questions here urged.

On June 25, 1982, during the pendency of the appellate proceedings before the Indiana Supreme Court, the respondent filed a Verified Petition for Writ of Certiorari to Supplement the Record of the Proceedings requesting the Indiana Supreme Court to "issue its order to the Brown Circuit Court, commanding the Judge there to make his written findings and conclusions as to the statutory grounds relied upon in imposing the sentence of death, and to certify the same to the Clerk of this Court forthwith."

The petitioner filed written objections to the granting of respondent's petition, arguing, inter alia "To order that the trial judge make additional findings of fact necessary to impose the death penalty, at this late stage, would twice place the appellant in jeopardy as proscribed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §14 of the Constitution of Indiana." The respondent's petition was granted by order of the Indiana Supreme Court dated February 11, 1983.

On February 22, 1983, the trial court filed its "Nunc pro tunc entry, pronouncement of sentencing" which is set out in Appendix D. As permitted by the February 11, 1983 order of the Indiana Supreme Court, the petitioner filed a Brief in Opposition to the Trial Court's Nunc Pro Tunc Entry. In it, he restated his objections based on grounds of double jeopardy, and in addition argued that he had been denied the right to be present and be heard at the time of resentencing, that the trial court had failed to consider the jury's verdict as to the sentence, and that the trial court's interpretation of the applicable Indiana statutes operated as a mandatory imposition of the death penalty.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A state court of last resort has decided federal questions in a way in conflict with decisions of this Court.

I. The review procedures established by I.C. 35-50-2-9 and adopted by the Indiana Supreme Court do not insure that the death penalty in the State of Indiana will not be inflicted in an arbitrary and capricous manner.

The Indiana death penalty statute, I.C. 35-50-2-9 (Appendix C) sets out the following requirements concerning review of a decision to impose a penalty of death:

> "A death sentence is subject to automatic review by the Indiana Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review."

The Indiana Supreme Court has never adopted formal rules regarding its standard of review in death penalty cases. Instead it has assembled an amalgam of statutes and court rules relating to sentences in general. As a result, the review undertaken where the death penalty is imposed in the State of Indiana is as follows:

1. The conviction and sentence of death is automatically appealable to the Indiana Supreme Court (I.C. 35-50-2-9 and Rule 4(A)(7), Indiana Rules of Appellate Procedure).

2. A written statement must be filed by the trial court setting forth the aggravating circumstances it found to exist and its reasons for imposing the particular sentence. (I.C. 35-4.1-4-3)

3. At the time of review, the Indiana Supreme Court will have before it the entire record of the proceedings, including trial transcript, presentence report and transcript of the sentencing hearing. Judy v. State, 416 N.E.2d 95 (Ind., 1981)

4. The Supreme Court, based on the above, will then determine whether the sentence is "manifestly unreasonable in light of

the nature of the offense and the character of the offender. . . . A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed." (Rule 2, Indiana Rules for the Appellate Review of Sentences)

Does such a procedure comply with this Court's holding in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that the death penalty could not be imposed in a manner and under a statutory scheme which created a substantial risk that it would be inflicted in an arbitrary and capricious manner?

Petitioner's first and primary attack on the Indiana death penalty statutes is the total absence of any type of proportionality review. In approving the procedures established for the imposition of the death penalty in Georgia and Florida, this Court, in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) commented at length on the system of reivew required by the respective appellate courts. Specifically mentioned, again at length, was the fact that in each state, either by statutory mandate or appellate decision, the reviewing court was required to compare the decision to impose the death penalty in the case before them with the decisions of judges and juries in similar cases.

In the most recent death penalty cases, Zant v. Stephens, 462 U.S. ____, 103 S.Ct. 2633, 76 L.Ed.2d ____ (1983) and Barclay v. Florida, 463 U.S. ____, 103 S.Ct. 3418, 76 L.Ed.2d ____ (1983), this Court, in affirming the imposition of the death sentence, emphasized that its decision to do so was based in part upon state review procedures which insured that the death penalty would be consistently applied in cases similar in nature.

In fact, this Court itself has engaged in a form of proportionality review in vacating the petitioners' sentences of death in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982

(1977) (rape) and in Enmund v. Florida, ____U.S.____, 102 S.Ct. ____, 73 L.Ed.2d 1140 (1982) (accomplice to murder which was not performed or intended by the defendant).

The Indiana death penalty statute and the rules of review utilized by the Indiana Supreme Court in no way insure that the death penalty imposed in a specific case will be consistent with the decisions of judges and juries in similar cases. A brief review of post-Furman death penalty decisions in Indiana is illustrative:

Six death penalty cases, including the petitioner's, have been reviewed on appeal since 1981. Besides petitioner's, these are Judy v. State, 416 N.E.2d 95 (Ind. 1981), Brewer v. State, 417 N.E.2d 889 (Ind., 1981), Williams v. State, 430 N.E.2d 759 (Ind., 1982), Lowery v. State, 434 N.E.2d 868 (Ind., 1982), and Daniels v. State, ____ N.E.2d ____ (Ind., 1983) (No. 380 S 66, decided Sept. 9, 1983). Lowery v. State, supra, was reversed based upon the trial court's failure to sequester the jury. In the remaining five, the decision of the trial court to impose the death penalty was upheld. In all cases but petitioner's, the jury had recommended death, and the trial court had followed that recommendation.

In that same period of time, at least eight cases have been decided by the Indiana Supreme Court where the death penalty had originally been requested but was not imposed by the trial court. These are as follows: Suggs v. State, 428 N.E.2d 226 (Ind., 1981), Felden v. State, 437 N.E.2d 986 (Ind., 1982), Dunaway v. State, 440 N.E.2d 682 (Ind., 1982), Lowry v. State, 440 N.E.2d 1123 (Ind., 1982), Hoskins v. State, 441 N.E.2d 419 (Ind., 1982), Johnson v. State, 442 N.E.2d 1065 (Ind., 1982), Miller v. State, 448 N.E.2d 293 (Ind., 1983), and Peterson v. State, 448 N.E.2d 673 (Ind., 1983). In at least six of these, Felden, Dunaway, Lowry, Johnson, Miller and Peterson, the jury returned a verdict at the sentencing hearing that the death penalty not be imposed, which verdict was

followed by the trial court.

In what ways is the petitioner's case similar to that of the other defendants whose death sentence was upheld and dissimilar, for example, from that of the defendant in Dunaway v. State, supra, who, after having sex with the victim, murdered her by cutting her throat, or from the defendant in Miller v. State, supra, who killed a two year old girl after sodomizing her? Under the Indiana scheme of review, those questions will never be answered, thus leaving the decision as to whether to impose the death penalty in potentially similar cases to the whim and caprice of the respective trial judges.

Secondly, this Court in Proffitt v. Florida, supra, cited as an additional safeguard the fact that the Florida Supreme Court will sustain a sentence of death following a jury recommendation of life only where "the facts suggesting a sentence of death (are) so clear and convincing that no reasonable person could differ." Proffitt v. Florida, supra at 249, 96 S.Ct. 2960, 59 L.Ed.2d 913, 921. That safeguard is not only not present in Indiana, but has in fact been turned on end.

As no new facts were contained in the presentence report, the judge and jury in the petitioner's case heard the same evidence concerning the sentence to be imposed, yet obviously disagreed. The Indiana Supreme Court, in its opinion, gave no particular weight to the jury's sentencing verdict, holding that it will reverse a trial court's sentence of death only where no reasonable person could find such sentence appropriate. (Rule 2, Indiana Rules for the Appellate Review of Sentences) This standard, the same that is applied to the Court's review of any sentence before it, does not insure that the death penalty in Indiana will not be arbitrarily imposed, particularly in light of the lack of porportionality review, and in no way rationally distinguishes those cases in which the death penalty is imposed from those in which it is not.